

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF RAMSEY HEALTH AUTHORITY

In the Matter of

The City of Ramsey

vs.

Amusement Center, Inc.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on January 8, 1992, in the Council Chambers, Ramsey Municipal Center, 15153 Nowthen Boulevard, Ramsey, Minnesota. The record in this matter closed on February 24, 1992, upon receipt of the City of Ramsey's Reply Memorandum. Amusement Center, Inc. did not submit a Reply Memorandum.

William K. Goodrich, Randall, Dehn & Goodrich, 2140 Fourth Avenue North, Anoka, Minnesota 55303, appeared on behalf of the City of Ramsey (City). Randall D. B. Tigue, Attorney at Law, 2620 Nicollet Avenue South, Minneapolis, Minnesota 55408, appeared on behalf of Amusement Center, Inc. (Respondent).

This report is a recommendation, not a final decision. Under Ordinance No. 91-14 of the City, the Ramsey Health Authority will make the final decision in this matter based upon all of the evidence presented. Exceptions to this report, if any, should be filed with William Rodman, M.D., Ramsey Health Authority, Ramsey Medical Center, 5300 153rd Avenue N.W., Ramsey, Minnesota 55303.

STATEMENT OF ISSUES

1. Whether portions of the adult bookstore operated by Respondent constitute a hazardous site as defined by Ordinance No. 91-14.

2. Whether the implementation of Ordinance No. 91-14 is a pretext for content-based censorship of the adult bookstore and whether this issue may be determined in this proceeding.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent owns and operates an adult bookstore (the Adult Bookstore) at 6710 Highway 10, Ramsey, Minnesota. Larry Holmberg is an owner or the owner of Respondent.

2. The Adult Bookstore is located in a separate single-story building with its own parking lot. The north side of the building facing Highway 10 has a sign that says "ADULT BOOK STORE." The north and east sides of the building have large signs, about three feet high and eight feet wide, that

state, "XXX." Exs. 8-17, 8-18 and 8-19.

3. Entrance to the Adult Bookstore is by a door on the center of the east side which enters into a large rectangular retail sales area. Adult magazines, books, videos and devices are on display there and available for sale. A clerk's area on a raised platform is located on the north wall of the retail sales area. T. 18, Ex. 6.

4. In the northwest corner of the retail sales area is a doorway to the rear areas of the Adult Bookstore in which video viewing booths are located. One sign on the wall near the doorway has an arrow pointing through the doorway and stating, "Video Booths, You Must Purchase Tokens Before Entering." Another sign there states:

CUSTOMER RULES

1. Do not make advances toward employees.
2. Do not hassle other customers.
3. \$3.00 minimum purchase of tokens every time you enter this building.
4. Tokens are not refundable.
5. No loitering along the white wall.
6. Customers who don't spend tokens will be thrown out permanently.
7. No merchandise allowed in booth area.
8. No sitting in car in our parking lot.
9. If you bounce a check here you will not be allowed in this building again.
10. You are not allowed in a booth unless the television is playing.
11. \$3.00 purchase of Tokens is good for 1 1/2 hour in booth area "Hang around time".

VIOLATORS OF THESE RULES WILL BE THROWN OUT PERMANENTLY!

Ex . 8-20.

5. The rear areas of the Adult Bookstore contains eighteen video booths and a bathroom. Twelve booths are located along the west wall and six are located in the northeast corner, with four along the east wall and two along the north wall. Ex. 6.

6. The booths are constructed with 2 x 4 stud walls covered on one side by plywood. Each of the booths has a full-size solid door at its entrance and each is equipped with a lockable doorknob. There is an opening above each door up to the ceiling. T. 19, 35 and 85, Exs, 7-3, 7-5, 7-6, 7-12, 8-1, 8-3, 8-5, 8-14 and 8-16. All of the booths except one are approximately three feet wide and three to four feet deep. The north-most booth on the west wall is a double booth. All booths are equipped with a television set located behind Plexiglas on the outside wall, a coin drop machine where tokens are inserted for operation of the T.V., and, in at least some cases, a channel selector for

choosing the video to be viewed. T. 20, 37 and 85, Exs. 8-1, 8-4, 8-5, 8-8, 8-12, 8-13 and 8-14. Each of the booths is equipped with a chair and the double booth has a large mirror mounted on its north wall.

7. All of the booths in the northeast corner have holes about three inches in diameter and approximately three feet above the floor cut into the plywood walls to the adjoining booths. These holes, or apertures, are known to those familiar with them as "glory holes." There had been some "glory holes" in one or two of the booths on the west wall, but they had been covered sometime prior to the hearing. T. 20, 37-39, and 86, Exs. 8-1, 8-15 and 8-16. There are some eye-level peep holes in the booth adjacent to the double booth through which it is possible to observe persons in the double booth. T. 86.

8. The lighting in the booths and adjacent common areas is very low. When the clerk goes to the back area, he or she uses a flashlight. It is particularly dark in the northeast corner. There is a single lightbulb in a two-light fixture in the hallway adjacent to the booths along the west wall. T. 18, 36, 84, 119-120, Exs. 7-5 and 7-6. There is one fluorescent bulb working in a two-bulb fixture located near the north wall. T. 84, Ex. 7-4. There are no lights in the booths, although some light apparently enters through the openings above the doorways in each of the booths near the ceiling. Exs. 7-3, 7-5 and 7-6. While the lighting is low, it is possible to see people in an adjacent booth through the glory holes. 1. 88 and 111.

9. Each of the booths has an opaque wooden door and when the door is closed, activities occurring within the booth cannot be viewed from the adjacent common area. T. 20, 37 and 98.

10. Large numbers of gay and bisexual men congregate in the common areas adjacent to the viewing booths at the Adult Bookstore, particularly in the larger common area adjacent to the six booths in the northeast corner. T. 21. It is not unusual to have six to nine men waiting for additional men to enter the area. T. 40 and 92. A great deal of sexual activity takes place among these men in the viewing booths, particularly in the six booths in the northeast corner. That sexual activity is primarily fellatio, but also includes anal intercourse, both of which occur within individual booths or between adjacent booths through the "glory holes." Masturbation also takes

place in the booths, both individually and, presumably, between individuals.

T. 68-70, 82, 87. Men entering the area will, on occasion, offer to pay one of the other men present for fellatio. T. 121.

11. The sex occurring among the gay and bisexual men at the Adult Bookstore is largely anonymous in that the participants seldom speak to each other, seldom know each other and sometimes don't see each other's faces. A common technique is for the occupant of one booth to signal the occupant of the adjacent booth by inserting one or two fingers through the glory hole. If the man on the other side is receptive, he will then insert his penis through the glory hole and the sexual activity will then occur. Such sexual activity is sometimes protected with a condom, sometimes it is not. Some of the gay and bisexual men engaging in sexual activity at the Adult Bookstore will engage in one sexual encounter and leave, others will engage in sexual activity with multiple partners at one time or in several encounters over the period of one visit to the Adult Bookstore. T. 87-93, 107-108, 118.

12. There is very little surveillance of the viewing booths and adjacent common areas by employees of the Adult Bookstore. Occasionally, the clerk will come back and encourage the customers present to spend their tokens in the coin machines. Otherwise, there is seldom an employee present in the area of the booths. T. 93 and 97.

13. The video booth areas of the Adult Bookstore and, in particular, the video booths in the northeast corner and adjacent common area, are constructed, used, designed and operated for the purpose of permitting persons to engage in fellatio and anal intercourse, among other sexual activities.

14. The apertures or glory holes existing in the plywood walls between the viewing booths in the northeast corner of the Adult Bookstore were designed and constructed to facilitate sexual activities between persons on either side of the wall.

15. The lighting, while very low, is apparently sufficient to view the activities occurring in the viewing booths through the glory holes and peep holes that exist and, therefore, would be sufficient to observe that activities from the adjacent common area if the doors to the booths were removed or had windows made of transparent material, such as glass or Plexiglas .

16. If the glory holes were covered in all the booths where they exist and if the doors to the booths were removed or replaced with transparent material, such as glass or Plexiglas, some of the gay and bisexual men engaging in fellatio and anal intercourse in and between the booths would be discouraged from doing so and would not engage in such activity, at least at the Adult Bookstore. Some of them may be encouraged to seek more long-lasting relationships with persons they know better, thereby reducing the anonymous and multiple sexual activity that contributes to the spread of infectious diseases, including AIDS and making it easier for public health officials to trace the sources of such diseases. T. 27, 71, 76.

17. The Adult Bookstore had opened on April 21, 1990. On April 23, 1990, the Ramsey City Council unanimously adopted Ordinance No. 90-7 which placed a 180-day moratorium on the operation of any adult bookstore in the City. The Adult Bookstore ceased operation and its owners commenced an action in Federal District Court. On May 11, 1990, the Court granted the owners a Temporary Restraining Order against the City from enforcing Ordinance No. 90-7. *Schneider v. City of Ramsey*, Memorandum, Opinion and Order Civ. No. 4-90-320 (D. Minn. May 11, 1990). On May 22, 1990, the City Council passed Ordinance No. 90-9, an interim zoning ordinance that made major amendments to Ordinance No. 90-7 and, rather than banning adult bookstores, limited their location. In an order dated June 19, 1990, the Federal District Court dissolved the Temporary Restraining Order and dismissed the owner's motion for a preliminary injunction as moot. In November 1991, the City adopted a permanent zoning ordinance regulating adult uses that is the subject of a pending U. S. District Court litigation brought by Respondent.

18. On July 23, 1991, the City Council adopted Ordinance No. 91-14 (the Health Ordinance) which became effective September 2, 1991. The Health Ordinance is identical in substance to a Minneapolis ordinance upheld against arguments that it was unconstitutional in Doe v. City of Minneapolis, 693 F. Supp. 774 (D. Minn. 1988), affirmed 898 F.2d 612 (8th Cir. 1990). The Health Ordinance was codified in the Ramsey City Code as Sections 5.15.01 - 5.15.04, and entitled "Regulation of Premises Conducive to High Risk Sexual Conduct". Ex. 1. The Health Ordinance provides, in relevant part:

5.15.02 DEFINITIONS.

- (1) The term "high-risk sexual conduct" means:
 - (a) fellatio
 - (b) anal intercourse
 - (c) vaginal intercourse with persons who engage in sexual acts in exchange for money.
- (2) The term "hazardous site" means any commercial premises, building or structure, or any part thereof, which is a site of high-risk sexual conduct.

5.15.03 BUILDING STANDARDS.

- (1) No commercial building, structure, premises or part thereof, or facilities therein, shall be so constructed, used, designed or operated for the purpose of engaging in, or permitting persons to engage in, sexual activities which include high-risk sexual conduct.
- (2) No person shall own, operate, manage, rent, lease, or exercise control of any commercial building, structure, premises, or portion or part thereof, which contains:
 - (a) Partitions between subdivisions of a room, portion or part of a building, structure or premises having an aperture which is designed or constructed to facilitate sexual activity between persons on either side of the partition.
 - (b) Booths, stalls, or partitioned portions of a room, or individual rooms, used for the viewing of motion pictures or other forms of entertainment, having doors, curtains or portal partitions, unless such booths, stalls, partitioned portions of a room, or individual rooms so used shall have at least one side open to an adjacent public room so that the area inside is visible to persons in the adjacent public room. Such areas shall be lighted in a manner that the persons in the area used for viewing motion pictures or other forms of entertainment are visible from the adjacent public rooms, but such lighting shall not be of such intensity as to prevent the viewing of the motion pictures or other offered entertainment.

Section 5.15.04 of the Health Ordinance establishes a procedure for the Ramsey Health Authority to inspect and determine the existence of a hazardous site, to notify the owner of the determination, to issue two warnings stating the reason for the health authority's belief that it is a hazardous site, and to allow the owner to request a hearing as to the existence of a hazardous site.

19. By letter of October 23, 1991, William Rodman, M D., the Ramsey Health Authority, notified Mr. Holmberg that, based upon his personal observations and a review of information presented to him by the City Police Department, the Adult Bookstore was a hazardous site as defined by the Health Ordinance. He ordered Mr. Holmberg to eliminate the partitions between the booths having apertures and to remove the doors from the booths in order that the booths would have at least one side open to an adjacent public room so that the area inside the booth would be visible to persons in the adjacent public room and ordered that the areas inside the booth be lighted in a manner such that persons in the booths would be visible from the adjacent public room. Ex. 2.

20. By letter of November 21, 1991, Dr. Rodman notified Mr. Holmberg that the City Police Chief had visited the Adult Bookstore on November 19, 1991, and that the conditions referred to in the letter of October 23, 1991, had not been eliminated. He requested that the orders of that letter be followed. Ex. 3.

21. By letter of December 3, 1991, Dr. Rodman notified Mr. Holmberg that on December 2, 1991, the City Police Chief had again visited the Adult Bookstore and observed that the conditions existing at the site, which caused it to be a hazardous site under the Health Ordinance, had not been eliminated. Ex. 4.

22. By letter of December 4, 1991, Respondent, by its attorney, demanded a hearing pursuant to Section 5.15.04 (2) (c) (1) of the Health Ordinance. Ex. 5. The City then requested that the Office of Administrative Hearings provide an Administrative Law Judge to conduct the hearing for the Health Authority.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Ramsey Health Authority and the Administrative Law Judge have jurisdiction in this matter pursuant to Section 5.15.04 of the Health Ordinance and Minn. Stat. 14,55. All procedural requirements of the Health Ordinance have been fulfilled

2. The constitutionality of the implementation of the Health Ordinance may not be determined in this proceeding.

3. The Adult Bookstore is a hazardous site as defined by the Health Ordinance in that it is a site of high-risk sexual conduct as defined by the

Health Ordinance, namely a site where persons engage in fellatio and anal intercourse.

4. The video booths of the Adult Bookstore, particularly the video booths in the northeast corner of the Adult Bookstore, are constructed, used, designed and operated for the purpose of permitting persons to engage in sexual activities, including high-risk sexual conduct in violation of Section 5.15.03 (1) of the Health Ordinance.

5. The video booths of the Adult Bookstore, particularly the video booths in the northeast corner, contain partitions between the booths having apertures designed and constructed to facilitate sexual activity between persons on either side of the partitions, and contain booths used for the viewing of video movies that do not have at least one side open to an adjacent public room so that the area inside is visible to persons in the adjacent public room in violation of Section 5.15.03 (2) of the Health Ordinance.

6. The Health Ordinance was adopted for the purpose of regulating high-risk sexual conduct for the purpose of reducing the spread of sexually-transmitted diseases, including AIDS, and not for the purpose of closing the Adult Bookstore because of the content of the products it sells.

7. In that the part of the Adult Bookstore containing the video booths constitutes a hazardous site as defined in the Health Ordinance, the Health Authority may issue an order requiring Respondent to take corrective measures to prevent high-risk sexual conduct from taking place within the premises and thereafter proceed in accordance with the enforcement provisions of the Health Ordinance.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Ramsey Health Authority order that:

Amusement Center, Inc. take corrective measures to prevent high-risk sexual conduct from taking place within the Adult Bookstore, namely that it:

(a) eliminate partitions between the viewing booths having apertures designed or constructed to facilitate sexual activity between persons on either side of the partition.

such (b) remove the doors from the viewing booths in order that
so booths have at least one side open to an adjacent public room
adjacent that the area inside the booth is visible to persons in the
adequate public room and assure that lighting inside the booths is
public so that persons in the booths are visible from the adjacent
room.

Dated this 13th day of March, 1992.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

It is requested that the Ramsey Health Authority serve a copy of its final decision upon the Administrative Law Judge as well as the parties.

MEMORANDUM

It is clear that the Adult Bookstore is a "hazardous site" and that its construction, use, design and operation violates provision of the Health Ordinance as set forth in the Conclusions. Because the constitutionality of a virtually-identical ordinance was upheld in *Doe v. City of Minneapolis*, 693 F. Supp. 774 (D. Minn. 1988), Affirmed 8-98 F.2d 612 (8th Cir 1990), Respondent did not argue that the Health Ordinance is invalid. Instead, it attempted to argue that the implementation of the Health Ordinance was an unconstitutional pretext for content-based censorship of the Adult Bookstore. Respondent claims that such pretext was proven because the Health Ordinance would do virtually nothing to prevent the spread of AIDS because the persons engaging in high-risk sexual conduct at the Adult Bookstore could engage in the same activity in numerous other places, because the City was aware that implementation of the Health Ordinance would have a dramatic impact on the Adult Bookstore's revenues, forcing it out of business, and because the Health Ordinance was enacted after other attempts to close the Adult Bookstore had been unsuccessful. While administrative officials must apply laws, rules and ordinances in a constitutional manner, questions of the constitutional validity of such enactments are not normally within the jurisdiction of administrative officials or tribunals. *Starkweather v. Blair*, 71 N.W.2d 869, 884 (Minn. 1955); *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 369 (Minn. 1977); *Holt v. State of Minnesota Board of Medical Examiners*, 431 N.W.2d 905, 906 (Minn. App. 1988). Respondent's questions regarding the enactment and implementation of the Health Ordinance go to its validity, not its application. Therefore, the Administrative Law Judge and the Ramsey Health Authority have no jurisdiction to consider the issue.

Moreover, the evidence in the record in this hearing does not support Respondent's factual assertions. The evidence establishes that enforcing the Health Ordinance at the Adult Bookstore would discourage the anonymous and multiple high-risk sexual activity that occurs there. Second, there was no evidence whatsoever in this matter as to what impact enforcing the Health Ordinance would have upon the Adult Bookstore's revenues. Even if the City Council had, in fact, assumed that the Health Ordinance would have some

detrimental impact on the Adult Bookstore's revenues, the focus of the Health Ordinance is public health, and it is therefore entirely proper. The impact on Respondent's revenue is secondary and Respondent does not have a guaranteed right to make a profit. Doe v. City of Minneapolis, 898 F.2d 612, 621 (8th Cir. 1990). Finally, there is no substantive evidence that the Council enacted the Health Ordinance in an attempt to close the Adult Bookstore. By its terms, the Health Ordinance regulates only high-risk sexual activity. Under the Health Ordinance, Amusement Center, Inc. is free to remain open and operate its business as long as it does so in a manner that does not permit and encourage high-risk sexual conduct.

S.M.M.